

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

APR 25 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BRENDA A. VARGAS,

Petitioner,

v.

JOHN F. KELLIHER, JR., Judge of
the Superior Court of the State of Arizona,
in and for the County of Cochise,

Respondent,

and

LINDA'S LOUNGE LLC, dba
LINDA'S BAR AND GRILL,

Real Party in Interest.

2 CA-SA 2011-0029
DEPARTMENT B

DECISION ORDER

SPECIAL ACTION PROCEEDING

Cochise County Cause No. CV201000662

JURISDICTION ACCEPTED; RELIEF GRANTED

Borowiec, Borowiec & Russell, P.C.
By Joel P. Borowiec

Sierra Vista
Attorneys for Petitioner

¶1 We accept jurisdiction over Brenda Vargas’s petition for special action, *see Smith v. Mitchell*, 214 Ariz. 78, ¶ 2, 148 P.3d 1151, 1152 (App. 2006), and grant relief. The respondent judge erred by denying as untimely the petitioner’s peremptory notice of change of judge made pursuant to Rule 42(f)(1), Ariz. R. Civ. P. No trial date had been set and none of the events triggering waiver of the petitioner’s peremptory right to a change of judge had occurred. Ariz. R. Civ. P. 42(f)(1)(C), (D). Nothing in Rule 42(f)(1) supports the respondent’s apparent conclusion that, even when a trial date has not been set, a party is required to act within a certain time after learning that a particular judge has been assigned. *See Guarrascio v. Fisher*, 154 Ariz. 186, 188, 741 P.2d 319, 321 (App. 1987) (ten-day limitation for notice of change of judge when judge newly assigned “applies only in those cases in which the initial assignment or change of judge occurs within 60 days prior to the date set for trial”). Accordingly, the respondent had no discretion to reject the petitioner’s notice. *See* Ariz. R. P. Spec. Actions 3(c) (special action relief warranted if respondent abused discretion); *State v. West*, 224 Ariz. 575, ¶ 8, 233 P.3d 1154, 1156 (App. 2010) (court abuses discretion if it commits error of law).

¶2 We therefore reverse the respondent’s denial of the petitioner’s notice of change of judge and remand the case for reassignment pursuant to Rule 42(f)(1)(F).

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

Presiding Judge Vásquez and Judge Kelly concurring.